Lim Joo Thong v Koperasi Serbaguna Taiping Barat Bhd

COURT OF APPEAL — CIVIL APPEAL NO A-02-146 OF 1996
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
27 MARCH 1997

Arbitration *— Award — Enforcement — Prohibitory order obtained to seize lands belonging to respondent — Stay of execution of order — Respondent's counterclaim not arbitrated upon — Whether respondent's counterclaim should have been arbitrated together with appellant's claim — Whether there were grounds for not enforcing award — Rules of the High Court 1980 O 47 r 1(1)(a)*

Civil Procedure *— Stay of execution of judgment — Application for — Arbitration award in favour of appellant — Leave to enforce award as judgment of the High Court — Respondent's counterclaim not arbitrated upon — Whether this was a relevant consideration — Whether sufficient to constitute special circumstances to stay execution of judgment — Rules of the High Court 1980 O 47 r 1(1)(a)*

The appellant ('LJT') and the respondent ('KSTBB') entered into two contracts for the construction and completion of infrastructure works and 177 units of single storey bungalows in Perak. Both the contracts are independent of each other. Owing to financial difficulties experienced by KSTBB, progress payments and construction works were delayed and the date of completion of the bungalows was extended. Clause 34 of the building contract provided for arbitration by a single arbitrator in the event of any dispute or difference arising under or in connection with the building contract. LJT subsequently commenced an action in the High Court, claiming against KSTBB for work done under the building contract and for interest thereon. On the other hand, KSTBB filed a defence and counterclaim for an aggregate amount and for interest thereon. LJT then applied and was granted an order for a stay of proceedings in his action pending arbitration. Hearing on the arbitration proceeded in the absence of KSTBB although duly notified after two postponements. The arbitrator then awarded a sum in favour of LJT against KSTBB.

On 3 June 1994, the High Court ordered leave to LJT to enforce the arbitration award and to enter judgment in terms of such award with costs. LJT subsequently obtained a prohibitory order to seize certain lands of KSTBB in execution of the judgment entered in the arbitration award. Later, however, it was ordered that a public auction under the prohibitory order to recover the judgment debt be postponed until the counterclaim of KSTBB was decided. LJT appealed. KSTBB argued that it had a counterclaim yet to be adjudicated upon by the arbitrator and which was still pending trial. The issue was whether that fact per se, without more, was sufficient to constitute special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order in the context of O 47 r 1(1)(a) of the Rules of the High Court 1980 ('the RHC').

Held, allowing the appeal:

(1) In order to constitute 'special circumstances' within the meaning of O 47 r 1(1)(a) of the RHC, an applicant had to show something more than that which was required to stay execution of a summary judgment under O 14 r 3(2) of the RHC. In this case, the mere fact that KSTBB's counterclaim was not arbitrated or litigated was indeed a relevant consideration. However, on its own, it was insufficient to constitute 'special circumstances' within the meaning of O 47 r 1(1)(a). KSTBB must show why its counterclaim was not arbitrated (see p 664E–H); *Ferdinand Wagner v Laubscher Bros & Co* [1970] 2 WLR 1019 and *Schofield v Church Army* [1986] 1 WLR 1328 followed.

The sole basis for the stay of both the original action and the counterclaim was the reference of both proceedings to arbitration. The order, which was not appealed on, was final and binding on the parties, and must therefore be discharged as a whole. In the premises, there was no basis or reason for saying that KSTBB's counterclaim was not heard because the order for stay of proceedings did not refer such counterclaim to arbitration. The reason why KSTBB's counterclaim was not arbitrated was because no initiative was taken by KSTBB to submit its counterclaim at any time. There was thus no counterclaim formally before the arbitrator and accordingly, he made no such direction. Therefore, although KSTBB's counterclaim was stayed by the order, it was not arbitrated. In the circumstances, LJT's claim was arbitrated in default of KSTBB's defence and there were no special circumstances which rendered it inexpedient to enforce the judgment and the prohibitory order (see pp 665G–H, 666H–I and 667C–D).

(2) The auction of the land attached under the prohibitory order must be allowed to proceed unless KSTBB satisfied the requirement of O 47 r 7(c) of the RHC. The purpose of the auction was to recover the balance of the judgment debt. There was no definite proposal by KSTBB to raise enough money to discharge the balance of the judgment debt plus interest thereon which continued to accrue. A general undertaking was insufficient to fulfill the specific requirements of O 47 r 7(c) (see p 667D–F).

[Bahasa Malaysia summary

Perayu ('LJT') dan penentang ('KSTBB') telah mengikat dua kontrak untuk pembinaan dan penyelesaian kerja-kerja infrastruktur dan 177 unit rumah banglo setingkat di Perak. Kedua-dua kontrak adalah bebas antara satu sama lain. Akibat kesulitan kewangan yang dialami oleh KSTBB, bayaran kemajuan dan kerja-kerja pembinaan tertunda dan tarikh penyelesaian rumah banglo dilanjutkan. Fasal 34 kontrak pembinaan memperuntukkan timbangtara oleh penimbangtara tunggal sekiranya pertikaian atau perbezaan timbul di bawah atau berhubung dengan kontrak pembinaan. LJT kemudiannya memulakan suatu tindakan di Mahkamah Tinggi, menuntut terhadap KSTBB untuk

kerja yang dijalankan di bawah kontrak pembinaan dan untuk faedah atasnya. Sebaliknya, KSTBB memfailkan pembelaan dan tuntutan balas untuk amaun agregat dan untuk faedah atasnya. LJT kemudiannya memohon dan diberikan satu perintah untuk menggantung prosiding dalam tindakannya sementara menunggu timbangtara. Pembicaraan ke atas timbangtara telah diteruskan dalam ketidakhadiran KSTBB walaupun telah diberitahu selepas dua penundaan. Timbangtara kemudiannya mengawardkan jumlah yang memihak kepada LJT terhadap KSTBB.

Pada 3 Jun 1994, Mahkamah Tinggi memerintahkan kebenaran diberikan kepada LJT untuk menguatkuasakan award timbangtara dan untuk memasukkan penghakiman seperti dikehendaki award demikian dengan kos. LJT kemudiannya memperolehi satu perintah larangan untuk menyita tanah-tanah KSTBB tertentu demi melaksanakan penghakiman yang dimasukkan dalam award timbangtara. Namun demikian, kemudiannya ia diperintahkan bahawa suatu lelong awam di bawah perintah larangan untuk mendapat balik hutang penghakiman ditunda sehingga tuntutan balas KSTBB diputuskan. LJT merayu. KSTBB menghujahkan bahawa ia mempunyai tuntutan balas yang belum lagi ditimbang tara oleh penimbangtara dan masih menunggu perbicaraan. Isu adalah sama ada hakikat tersebut per se, tanpa lebih daripada itu, adalah mencukupi bagi membentuk hal keadaan yang khas yang menjadikan tak suaimanfaat untuk menguatkuasakan penghakiman bertarikh 3 Jun 1994 atau perintah larangan dalam konteks A 47 k 1(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, membenarkan rayuan:

(1) Bagi membentuk 'hal keadaan yang khas' dalam lingkungan maksud A 47 k 1(1)(a) KMT, seseorang pemohon hendaklah menunjukkan sesuatu yang lebih daripada apa yang diperlukan untuk menggantung pelaksanaan penghakiman terus di bawah A 14 k 3(2) KMT. Dalam kes ini, hakikat semata-mata bahawa tuntutan balas KSTBB tidak ditimbang tara atau dilitigasikan memang merupakan pertimbangan yang relevan. Walau bagaimanapun, dengan sendirinya, ia adalah tidak memadai untuk membentuk 'hal keadaan yang khas' dalam lingkungan maksud A 47 k 1(1)(a). KSTBB mesti menunjukkan mengapa tuntutan balasnya tidak ditimbang tara (lihat ms 664E–H); *Ferdinand Wagner v Laubscher Bros & Co* [1970] 2 WLR 1019 dan *Schofield v Church Army* [1986] 1 WLR 1328 diikut.

Dasar tunggal untuk penggantungan kedua-dua tindakan asal dan tuntutan balas adalah rujukan kedua-dua prosiding kepada timbangtara. Perintah itu, yang tidak dirayu, adalah muktamad dan mengikat ke atas pihak-pihak, dan dengan itu mestilah dilaksanakan secara keseluruhan. Berdasarkan ini, tiada asas atau alasan untuk mengatakan bahawa tuntutan balas KSTBB tidak dibicarakan kerana perintah untuk penggantungan prosiding tidak

merujukkan tuntutan balas demikian kepada timbangtara. Sebab mengapa tuntutan balas KSTBB tidak ditimbang tara adalah kerana tiada daya usaha telah diambil oleh KSTBB untuk menyerahkan tuntutan balasnya pada bila-bila masa. Justeru itu, tiada tuntutan balas secara rasmi di hadapan penimbangtara dan oleh itu, beliau tidak membuat arahan sedemikian. Maka, meskipun tuntutan balas KSTBB digantung oleh perintah itu, ia tidak ditimbang tara. Dalam keadaan ini, tuntutan LJT telah ditimbang tara mengingkari pembelaan KSTBB dan tiada hal keadaan yang khas yang menjadikannya tak suaimanfaat untuk menguatkuasakan penghakiman dan perintah larangan (lihat ms 665G–H, 666H–I dan 667C–D).

(2) Lelong ke atas tanah yang dikenakan di bawah perintah larangan mestilah dibenarkan diteruskan melainkan KSTBB memenuhi keperluan A 47 k 7(c) KMT. Tujuan lelong adalah untuk mendapat balik baki hutang penghakiman. Tiada cadangan yang pasti oleh KSTBB untuk mendapatkan wang yang cukup bagi melunaskan baki hutang penghakiman bersama faedah atasnya yang terus terakru. Akujanji am adalah tidak memadai untuk memenuhi keperluan spesifik A 47 k 7(c) (lihat ms 667D–F).]

Notes

For cases on enforcement of award, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 742–747.

For cases on application for stay of execution of judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3120–3121.

Cases referred to

Ferdinand Wagner v Laubscher Bros & Co [1970] 2 WLR 1019 (folld)
Moore v Povey (1939–40) 56 TLR 564 (refd)
Schofield v Church Army [1986] 1 WLR 1328 (folld)

Legislation referred to

Arbitration Act 1952 ss 6, 27
Rules of the High Court 1980 O 14 r 3(2), O 47 rr 1(1), 7

Appeal from: Originating Summons No 24–262 of 1993(T) (High Court, Taiping)

Faizul Hilmy bin Ahmad Zamri (*WY Chan & Roy*) for the appellant.
Gurbachan Singh (*Bachan & Kartar*) for the respondent.

Denis Ong JCA (delivering the judgment of the court): The respondent ('KSTBB') who was the defendant and the appellant ('LJT') who was the plaintiff in the court below entered into two contracts in writing dated 21 October 1982 and 29 February 1984 for the construction and completion of infrastructure works and 177 units of single storey bungalows at Taman Long Jaafar, Jalan Raja Sulong, Kampong Boyan, Taiping, Perak. Although

A the infrastructure works constructed were for the 177 units of bungalows, the two contracts were separate and distinct. In terms of costs, administration and performance, they were unrelated and independent of each other. In this appeal, we were concerned solely with the building contract for the 177 units. The contract sum for the 177 units was RM8,825,060.70 and the date of completion was stipulated to be B 28 February 1986. As a result of an omission of three units to be constructed on Lots 8121, 8122 and 8130 (valued in aggregate at RM149,577.30) to make way for road deviation, the total number of units actually completed was 174 and the contract sum of RM8,825,060.70 originally stipulated was revised to RM8,675,483.40. Owing to financial difficulties experienced C by KSTBB, progress payments and construction works were delayed and the date of completion was extended to 30 June 1989 initially and then to 19 December 1990. Clause 34 of the building contract provided for arbitration by a single arbitrator in the event of any dispute or difference arising under or in connection with the building contract. However, on 5 February 1991, LJT commenced GS No 22–23–91 in the Ipoh High D Court claiming RM1,600,558.37 against KSTBB for work done under the building contract and for interest thereon. Learned counsel for LJT confirmed at the hearing of this appeal that the statement of claim in GS No 22–23–91 did not form part of the appeal record. On 21 August 1991, KSTBB filed a defence and counterclaim for an aggregate amount E of RM1,660,042.30 and for interest thereon. On 6 August 1992, on the application of LJT made under s 6 of the Arbitration Act 1952 ('the Act'), the Ipoh High Court judge after hearing both sides ordered a stay of proceedings in GS No 22–23–91 pending arbitration. On 18 February 1993, Mr WY Chin was appointed arbitrator by the President Pertubuhan Akitek Malaysia ('PAM') pursuant to the provisions of cl 34 of the building F contract. On 23 June 1993, LJT filed his statement of claim and bundles of documents and on 11 August 1993 and 12 August 1993, hearing on arbitration proceeded in the absence of KSTBB although duly notified and after two postponements. On 28 October 1993, the arbitrator awarded in favour of LJT against KSTBB a sum of RM2,372,256.45 under the G building contract to be paid within 21 days from 28 October 1993 in default whereof interest thereon at the rate of 8% pa until final settlement and costs of arbitration fixed at RM21,252.20 inclusive of arbitrator's fees, expenses, disbursements and PAM's charges.

On 3 June 1994, on the application of LJT dated 27 November 1993 H made under s 27 of the Act by SP No 24–262–93(T), Abdul Malik Ishak JC, High Court Taiping after hearing both sides, ordered leave to LJT to enforce the arbitration award dated 28 October 1993 in the same manner as a judgment or order of the High Court to the same effect and to enter judgment in terms of such award with costs. The judgment of Abdul Malik Ishak JC was reported in [1994] 3 CLJ 341. On 8 June 1994, I KSTBB filed a notice of appeal to the Federal Court against the order dated 3 June 1994 of the learned judicial commissioner. It was entered as Mahkamah Agung Rayuan Sivil No 02–330–1994. On 8 November 1994, KSTBB filed in the Federal Court a notice of motion for time to be extended up to 22 July 1994 to file the appeal record and for a stay of

execution of the said judgment dated 3 June 1994. The motion was fixed for hearing on 26 June 1995 in the Federal Court. On 22 August 1994, LJT obtained a prohibitory order to seize certain lands of KSTBB in execution of the judgment entered in the arbitration award. On 5 December 1994, Zulkefli JC, High Court Taiping ordered a stay of execution of the said prohibitory order until the disposal of KSTBB's appeal in Mahkamah Agung Rayuan Sivil No 02–330–1994. Against that order, LJT filed a notice of appeal dated 21 December 1994 to the Court of Appeal and his appeal was entered as Mahkamah Rayuan Rayuan Sivil No A–02–352–94. On 26 June 1995, the Federal Court dismissed the motion and the appeal in Mahkamah Agung Rayuan Sivil No 02–330–1994 with costs. On 9 December 1995, LJT wholly discontinued his appeal in Mahkamah Rayuan Rayuan Sivil No 02–352–94 by filing a notice of discontinuance dated 4 December 1995.

By an ex parte summons in chambers dated 13 December 1995 supported by an affidavit of Wan Ahmad bin Sharif affirmed on 12 December 1995, KSTBB applied for a postponement of the public auction fixed for 18 December 1995 until after: (a) the instant application was heard, and (b) until the counterclaim of KSTBB in GS No 22–23–91 had been determined. The summons was first heard ex parte on 18 December 1995 and the learned judicial commissioner ordered in terms of relief (a) and directed that the summons be heard inter partes on 8 January 1996 in respect of relief (b). It was actually heard on 2 February 1996 and on 16 February 1996, Zulkefli J gave an oral decision that the public auction fixed for 18 December 1995 be postponed until the counterclaim of KSTBB was decided. Against that decision, LJT appealed to this court. So much for the facts.

We heard this appeal on 27 March 1997 and on the same day made known our decision orally that we allowed the appeal with costs here and below and directed that the deposit be refunded to LJT.

The main relief asked for in the said summons was clearly relief (b) that was to say, an order that the public auction fixed for 18 December 1995 be postponed until KSTBB's counterclaim was decided. Relief (a) asked for in the said summons was purely ancillary. The grounds of application were stated in paras 10, 11, 12, 13, 14 and 14(a) of the affidavit of Wan Ahmad bin Sharif, the honorary secretary of KSTBB, affirmed on 12 December 1995 in support of the said summons. Briefly, they were that: (1) KSTBB had a good defence which ought to be tried and without a trial the judgment in default handed down to KSTBB was unfair; (2) that KSTBB had a counterclaim against LJT which was not adjudicated upon by the arbitrator and which was still pending trial; (3) KSTBB's absence from the arbitration proceedings was unintentional, its counsel having gone overseas and KSTBB was not informed of what should be done; (4) that the lands to be auctioned exceeded RM1m in value which was more than the reserve price fixed at RM825,250; and (5) that KSTBB undertook to abide by all orders to be made by the court if subsequently, such court was of the view that LJT suffered any loss which KSTBB should pay.

In his judgment, the learned judge dealt only with ground (2). According to him at p 24 of the appeal record, the issue that must be decided was whether the counterclaim of KSTBB had been heard by the arbitrator. On the affidavit evidence of both sides, he found as facts that the counterclaim had not been heard and had not been decided by the arbitrator and further, that the counterclaim in GS No 22–23–91 was still alive and active and in his view, the latter fact constituted 'special circumstances' for him to postpone the public auction fixed for 18 December 1995. He reasoned that if the public auction was not postponed and if subsequently KSTBB should succeed in its counterclaim, it would lose its lands and would not be able to recover them. In that event, it would be an injustice to KSTBB. The learned judge stated expressly that in arriving at his decision, he did not consider the neglect of KSTBB's solicitor in not appearing to conduct KSTBB's case before the arbitrator.

In his outline of submission tendered to this court, Mr Faizul Hilmy, learned counsel for LJT formulated the issue in this appeal thus: whether the counterclaim of KSTBB (unheard or yet to be heard) could be regarded as a special circumstance for the court (ie the Taiping High Court) to grant an order of stay of execution of the judgment without taking into account the facts as to why the said counterclaim was unheard or yet to be heard. In his outline of submission tendered to this court, Mr Gurbachan Singh, learned counsel for KSTBB formulated the issue in this appeal thus: whether the counterclaim of KSTBB which was yet to be disposed off constituted a special circumstance for a stay of auction order pending the disposal of the said counterclaim.

It was obvious that both sides relied on O 47 r 1(1)(a) of the Rules of the High Court 1980 ('the RHC') although neither adverted to it expressly here or below. It was a fact that as at 18 December 1995, the date fixed for the second public auction, the counterclaim of KSTBB was not heard in the sense that it was not arbitrated or litigated. The overall question then was whether that fact per se, without more, was sufficient to constitute special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order dated 22 August 1994 in the context of O 47 r 1(1)(a) of the RHC.

In substance, Mr Faizul argued that both the original action and the counterclaim in GS No 22–23–91 were stayed and referred to arbitration by the Ipoh High Court order dated 6 August 1992. LJT's claim was in fact referred to arbitration and was arbitrated but not KSTBB's counterclaim. The mere fact that KSTBB's counterclaim was not arbitrated was not enough to establish special circumstances. KSTBB must show why its counterclaim was not arbitrated. In this regard, KSTBB was given every opportunity to participate in the arbitration but it did nothing. KSTBB's predicament was entirely its own making. In considering whether a stay should be granted, the court below should have taken into account the refusal, neglect and conduct of KSTBB which it did not.

Mr Gurbachan said that Mr Faizul's argument was misconceived and irrelevant. The fact was that KSTBB's counterclaim in GS No 22–23–91 was still pending trial. He argued that the only reason why KSTBB's

counterclaim was not arbitrated was because the order dated 6 August 1992 did not refer such counterclaim to arbitration. That order applied only to LJT's original action because LJT applied for its stay and arbitration. There was no mention of KSTBB's counterclaim in that order and neither LJT nor KSTBB referred such counterclaim to be arbitrated. In this respect, we noted that Mr Gurbachan's argument before us did not coincide with Mr Su's argument before the judge below who argued that KSTBB's counterclaim was not arbitrated because KSTBB did not file its counterclaim with the arbitrator. Mr Su did not dispute that the order dated 6 August 1992 referred LJT's claim in the original action and KSTBB's counterclaim to arbitration. He said that the reason why KSTBB's counterclaim was not filed or arbitrated was because there was nothing in the order requiring LJT's claim and KSTBB's counterclaim to be heard at the same time. Thus, although LJT's claim was arbitrated, it was open to KSTBB to refer its counterclaim at any time before another arbitrator. To my mind, clearly there was a significant shifting of ground from one that did refer the counterclaim to arbitration to one that did not vis-a-vis that order. The judge below accepted Mr Su's argument and on that basis decided that there were special circumstances in the fact that KSTBB's counterclaim was not arbitrated.

The first point raised by Mr Faizul was whether the mere fact that KSTBB's counterclaim was not arbitrated was sufficient by itself to constitute special circumstances within the meaning of O 47 r 1(1)(a) of the RHC. Neither side cited any case law authority in point. We were not aware of any local decision on the matter. However, a similar issue arose in England in *Ferdinand Wagner v Laubscher Bros & Co* [1970] 2 WLR 1019 and the Court of Appeal (per Lord Denning MR at p 1022E) held that that fact alone without more was no special reason within the meaning of the English Rules of the Supreme Court O 47 r 1(1) which corresponded to our O 47 r 1(1)(a) of the RHC. *Wagner*'s case was considered in *Schofield v Church Army* [1986] 1 WLR 1328 where at p 1336A–E, Dhillon LJ held that an applicant had to show something more than that which was required to stay execution of a summary judgment under the English RSC O 14 r 3(2) which corresponded to O 14 r 3(2) of our RHC and that something more in that case lay in the circumstances why the claims in the High Court action there had not so far been litigated. Adopting the same tests laid down in *Wagner*'s case and *Schofield*'s case to the present case under appeal, we hold that the mere fact that KSTBB's counterclaim in GS No 22–23–91 was not arbitrated or litigated was a relevant consideration. By itself however, it was insufficient to constitute 'special circumstances' within the meaning of O 47 r 1(1)(a) of the RHC.

The second point, raised by Mr Gurbachan, was whether the Ipoh High Court order dated 6 August 1992 applied to LJT's original action and KSTBB's counterclaim in GS No 22–23–91 as Mr Faizul contended or to LJT's original action but not to KSTBB's counterclaim as Mr Gurbachan contended. The dispute here concerned the scope of that order. If KSTBB disputed or was dissatisfied with that order, as Mr Gurbachan's argument seemed to suggest, it was open to KSTBB to

A appeal against it to the (then) Supreme Court way back in 1992. Since there was no such appeal, that order was final and binding on the parties and beyond dispute now. We noted that it was recorded in the judgment at p 18 of the appeal record that Mr Faizul represented that both proceedings by original action and by counterclaim in GS No 22–23–91 in the Ipoh High Court were stayed by mutual consent of the parties for the claim and B counterclaim to be referred to the arbitrator for determination. We also noted that there was no record in that judgment of any protest or denial by Mr Su of Mr Faizul's representation. In the circumstance, it must be regarded that Mr Faizul's representation was true.

To us, the wording of the operative part of the order dated 6 August C 1992 at p 28 of the appeal record was clear and unambiguous. It spoke of 'prosiding-prosiding' in the national language meaning proceeding by original action and proceeding by counterclaim, that was to say, both proceedings were stayed and required by that order to be referred to arbitration. There could be no two views about it. If it was intended to D exclude the counterclaim from arbitration, the operative part of that order would have said so expressly or would have been restricted specifically to proceeding by original action. In this connection, we also looked at the points raised in the defence and counterclaim at p 403 of the appeal record and to our mind they fell squarely within the arbitration agreement cl 34, having arisen out of or in connection with the building contract solely and E there was no good reason why those points should not be referred to arbitration together with the points of claim at p 31 of the appeal record before a single arbitrator. That order was one entire order made under s 6 of the Act which stayed both the original action and the counterclaim and required both to be referred to arbitration. It was not open to KSTBB to F pick that part of the order which ordered a stay of the counterclaim that suited it and to reject that part of the order which ordered such counterclaim to be referred to arbitration: see *Moore v Povey* (1939–40) 56 TLR 564. The sole basis for the stay of both the original action and the counterclaim in GS No 22–23–91 was the reference of both proceedings to arbitration. The order must therefore be discharged as a whole. It made little or no G sense to us to order a stay of both the original action and the counterclaim and to order only the original action for arbitration. In the premises, we found no merit in the argument of Mr Gurbachan and thus no basis or reason for saying that KSTBB's counterclaim was not heard because the order dated 6 August 1992 did not refer such counterclaim to arbitration.

H In the light of the stand we took of the order dated 6 August 1992, why then was KSTBB's counterclaim not arbitrated? Wan Ahmad bin Sharif in his affidavit affirmed on 12 December 1995 in support of KSTBB's ex parte summons in chambers dated 13 December 1995 deposed that KSTBB was not given the opportunity to put forward its case before the arbitrator because its solicitor was absent on the day of the hearing and I KSTBB as a lay person was not knowledgeable of the legal ways and was unable to defend itself. Wan Ahmad bin Sharif explained that KSTBB's solicitor was overseas at that time and had not informed KSTBB of what should be done. LJT in his affidavit affirmed on 2 February 1996 replied

that KSTBB's failure to put forward its case before the arbitrator was because KSTBB and/or its solicitor failed to appear in the proceeding before the arbitrator despite having been notified repeatedly by the arbitrator himself. The judge below acknowledged at pp 24 and 25 of the appeal record that he did not take into account at all the negligence of KSTBB's solicitor in deciding whether there were special circumstances to postpone the public auction. As to why KSTBB's counterclaim was not arbitrated, Mr Faizul, in his submission before us, attributed it to KSTBB's refusal or negligence which he said that the judge below did not consider. Mr Gurbachan did not touch on this point having maintained that the only reason why the counterclaim was not arbitrated was because the order dated 6 August 1992 did not refer it to arbitration. Guided by the decisions in *Wagner*'s case and *Schofield*'s case, it was relevant and necessary to consider why the counterclaim was not arbitrated in deciding whether or not there were special circumstances under O 47 r 1(1)(a) of the RHC. In this connection, we were satisfied from a perusal of the notes of proceedings recorded by the arbitrator in the appeal record that from the start, KSTBB failed to attend by its own representative or its solicitor at the preliminary hearing on 11 June 1993 fixed by the arbitrator despite having been duly notified. It failed to pay the RM5,000 arbitration deposit and it did not file its defence or counterclaim or its bundle of documents with the arbitrator. It did not say 'no' to arbitration and had twice requested for its postponement. The first request was granted but not the second. It was also reminded to pay its share of the arbitration deposit which it did not. It did not attend the arbitration proceeding whatever. Those were the circumstances which explained why the counterclaim in GS No 22–23–91 was not arbitrated.

Whether or not KSTBB's counterclaim should be arbitrated together with LJT's claim (a point raised by Mr Su before the judge below in connection with the order dated 6 August 1992) was eminently a matter for the arbitrator to direct. The initiative was on LJT and KSTBB to submit its points of claim and counterclaim respectively to the arbitrator in compliance with the order dated 6 August 1992. But by not paying its share of the deposit and not submitting its points of counterclaim, KSTBB virtually precluded and pre-empted any such direction by the arbitrator. The arbitrator proceeded with the arbitration of LJT's claim and at the preliminary hearing on 11 June 1993 directed LJT's points of claim to be submitted by 22 June 1993 and its bundle of documents by 1 July 1993. He also directed KSTBB to pay its share of deposit and to submit its points of defence and bundle of documents by 30 July 1993 (see appeal record p 45) which KSTBB was bound to comply. However, it did not comply. In the circumstances, LJT's claim was arbitrated in default of KSTBB's defence. No initiative was taken by KSTBB to submit its counterclaim at any time. There was thus no counterclaim formally before the arbitrator; accordingly, he made no such direction. In the result, although KSTBB's counterclaim in GS No 22–23–91 was stayed by the order dated 6 August 1992, it was not arbitrated. From pp 44– 45 of the appeal record (paras 2.1.13 to 2.1.19), it was plain that both KSTBB and

its solicitor knew that the deposit was payable as the first step but none was too keen to abide. At para 2.2 pp 46 to 47 of the appeal record, the arbitrator gave his reasons for proceeding ex parte as the only available option and he concluded that KSTBB was 'genuinely the reluctant party — not willing whatsoever to be a party in the instant arbitration' and if KSTBB was disadvantaged in any way, that was entirely its own doing and it had only itself to blame.

We agreed entirely with the arbitrator's finding of fact which in our view was well justified and forthright in the circumstances. The reason why KSTBB's counterclaim in GS No 22–23–91 was not arbitrated was due to KSTBB's lack of initiative and poor response due its overall reluctance to have the claim and counterclaim determined expeditiously by the appointed arbitrator in compliance with the order dated 6 August 1992. In the premises, we hold that there were no special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order dated 22 August 1994.

In the light of what we said above, the second auction of the land attached under the prohibitory order must be allowed to proceed unless KSTBB satisfied the requirement of O 47 r 7(c) of the RHC, a point which the judge below did not address his mind to. Mr Gurbachan said that the purpose of the second auction was to recover RM422,000, the balance of the judgment debt exclusive of interest thereon. We were unable to find any definite proposal by KSTBB in the affidavit of Wan Ahmad bin Sharif affirmed on 12 December 1995 to raise enough money to discharge the balance of the judgment debt plus interest thereon which continued to accrue. There was a general undertaking in para 14(a) which quite clearly was insufficient to fulfill the specific requirements of O 47 r 7(c).

For these grounds stated, we decided to allow the appeal with costs here and below and that the deposit to be refunded to the appellant and we ordered accordingly.

Appeal allowed.

Reported by David Lai